INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY, AND UNITED FUEL GAS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 2, 1961.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit (App. A, *infra*, pp. 22–38) are reported at 293 F. 2d 761. The orders of the Federal Power Commission (R. 524–540, 585–591) are reported at 24 F.P.C. 204 and 525.

JURISDICTION

The judgment of the Court of Appeals setting aside the Commission's orders was entered on August 2, 1961 (App. C, *infra*, p. 44). A petition for rehearing, timely filed, was denied on October 5, 1961 (App. C, *infra*, p. 44). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Respondent pipeline company filed increased rates predicated on a cost of service which included a claim to a 7 percent return on net investment. After suspension for five months, the new rates went into effect subject to refund of any portion not ultimately justified by the pipeline company. The Commission, treating separately the issue of rate of return, found, after full hearing, that 7 percent was excessive and that 6⅛ percent would be proper. It thereupon ordered a reduction, *pro tanto*, of the increased rates which were being collected subject to refund.

The question, which arises under Section 4 of the Natural Gas Act, is whether the Commission upon finding that a portion of the company's justification for the proposed rates is deficient may immediately order the rates reduced to the extent of the proved deficiency without awaiting the completion of all phases of the rate proceeding.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717–717w, are set out in Appendix B, *infra,* pp. 39–43.

STATEMENT

The increased rate filing.—On October 5, 1959, Tennessee Gas Transmission Company tendered increased rates for filing pursuant to Section 4(d) of the Natural Gas Act, *infra,* p. 40. These rates represented an annual increase of $26,590,138 in Tennessee's revenues based on sales for the test year ended July 31, 1959 (R. 503).[1] The need for this increase was predicated, *inter alia,* upon a claimed cost of service which included a return of 7 percent on investment (R. 498–501).

By order of November 4, 1959, the Commission set a hearing to determine the lawfulness of these new rates and suspended their operation for the statutory term of five months (R. 502–505). The hearing started on February 2, 1960 (R. 524).[2] On April 5,

[1] This increase was in addition to previous increases (FPC Docket Nos. G-11980 and G-17166) which are still pending before the Commission. Those increases had become effective, subject to refund, on July 14, 1957, and May 15, 1959, respectively, and totalled about $24,077,000 and $19,184,000 annually. Thus, the creased rates filed on October 5, 1959, were intended to produce about $70,000,000 more in revenues than the rates last approved by the Commission.

[2] The Commission had originally ordered the hearing to commence on December 15, 1959 (R. 504), but by notice of November 16, 1959, granted Tennessee's request for a postponement.

1960, at the close of the five-month suspension period and during the course of the hearing, the rates became effective, subject to an undertaking by Tennessee to make refund of any portion found by the Commission not justified, together with interest thereon at the rate of 7 percent per annum (R. 505–509).

At the hearing, Tennessee presented all of its direct evidence. Its witnesses, however, were cross-examined only on the issue of rate of return. The staff of the Federal Power Commission and the West Virginia Public Service Commission presented evidence only on the rate of return, and their witnesses were cross-examined. None of the other interveners sought to present evidence on rate of return. Tennessee then presented rebuttal testimony on rate of return; cross-examination of this testimony was concluded on May 25, 1960 (R. 524–525).

After all the evidence on rate of return had been presented, the Commission staff counsel moved that the proceeding be divided into two phases: (1) determination of rate of return; (2) determination of the various other factors entering into the company's cost of service. He proposed further that, if it were found, in the first phase, that a proper rate of return was less than 7 percent, the Commission enter an interim order, reducing Tennessee's rates *pro tanto* and directing corresponding refunds for the past.[28] Concurrently, staff counsel requested waiver of the examiner's intermediate decision on the issue of the rate of return (R. 525).

---

[28] This proposal contemplated acceptance of all of Tennessee's other claims for purposes of an interim order.

Tennessee opposed this interim order procedure,[3] relying upon the fact that the proper method of allocating Tennessee's cost of service among its six zones was contested, and that in another proceeding relating to Tennessee's rates for an earlier period (FPC Docket No. G–11980) the zone allocation issue had been tried and was awaiting decision by the hearing examiner (R. 591–606).[4]

On June 17, 1960, the Commission granted the motion to waive the intermediate decision on rate of return and provided for oral argument on that issue and on the question whether interim rate reductions and refunds should be ordered in the event Tennessee's 7 percent figure was found excessive (R. 513–516). Thereafter, on July 19, 1960, Tennessee filed an untimely[5] motion requesting the Commission to waive the intermediate decision procedure with respect to the zone allocation issue in the other proceeding (No. G–11980) and to decide that issue simultaneously

[3] Several interveners, including the so-called Columbia Companies (R. 607–625), also opposed this procedure. The related proposal of waiver of the examiner's decision on rate of return was unopposed (R. 513).

[4] Tennessee also pointed out that the hearing examiner in No. G–11980 had ruled that determination of the zone allocation issue in that proceeding would govern the method of allocating costs among Tennessee's six zones in the instant case (R. 605).

[5] The Commission's rules provide that motions requesting waiver of the examiner's intermediate decision shall be made no more than five days after conclusion of the hearings. 18 C.F.R. 1.30(c)(3). Hearings on the severed zone allocation issues in Tennessee's earlier case were concluded on December 17, 1959 (R. 522).

with the rate of return issue in this proceeding (R. 519–521). This motion, which was opposed by a number of parties (including the Columbia Companies), was denied on August 5, 1960 (R. 521–523).

On August 9, 1960, the Commission entered the order challenged below. It found that an overall rate of return of 6⅛ percent was fair, just and reasonable for Tennessee. Accordingly, it disallowed Tennessee's rates, computed by the company on the basis of an excessive (7 percent) rate of return, and directed it to file interim reduced rates. It ordered that these interim rates become effective (subject to possible further refund at the conclusion of the entire rate proceeding) as of April 5, 1960, the date on which the disallowed rates had gone into effect, and that refunds be made to the extent that the company had collected, since April 5, 1960, amounts in excess of said interim rates (R. 524–540). The Commission pointed out that by requiring Tennessee to file substitute rates based on a proper rate of return, but otherwise based on the company's own claims, Tennessee and its customers would be placed in the same position as if Tennessee had originally filed increased rates based on a proper rate of return (R. 536).

On September 27, 1960, the Commission denied applications for rehearing filed by Tennessee and the Columbia Companies (R. 585–591). Both applications questioned the validity of the interim order procedure, and Tennessee also challenged the determination of the rate of return. The substitute rates, which have resulted in an annual revenue reduction

of about 10¾ million dollars, based on test year figures, have been in effect since November 1, 1960.[6]

Proceedings in the court below.—The court below unanimously affirmed the Commission's determination that a 6⅛ percent rate of return was just and reasonable for Tennessee, but by a divided vote (Chief Judge Tuttle dissenting)[7] set aside the Commission order to the extent that it required Tennessee to make lower rates effective immediately and to refund the amounts collected in excess of the substitute rates.[8]

On the latter issue, the majority concluded that, in the absence of a Commission decision on the zone cost-allocation issue, there was no basis for determining which of Tennessee's rates were unlawful; and that, although a natural gas company has the burden of justifying increased rates proposed by it, it "should not be held, at its peril, to the requirement of foretelling the decision of the Commission on the correctness" of such increased rates (App. A, *infra*, p. 33). The majority also stated that, regardless of the Commission's authority, the allocation of costs among zones is "such an essential element in determining whether the filed rates

[6] Stays of the reduction and refund order were denied by the Fifth Circuit, Judge Wisdom dissenting. *Tennessee Gas Transmission Co.* v. *Federal Power Commission*, 283 F. 2d 729 (C.A. 5).

[7] Chief Judge Tuttle wrote the court's opinion affirming the Commission's rate of return decision.

[8] Tennessee has refunded $7,416,663, plus interest, for the period from April 5, 1960 through October 31, 1960.

are excessive" that issuance of the interim rate order in advance of decision on the allocation issue was an abuse of discretion (App. A, *infra,* p. 34). Chief Judge Tuttle, dissenting, stated that he would have affirmed the Commission's order giving immediate effect to the conclusion that the rates based on an excessive rate of return were unreasonable. In his view, the applicant had the burden to establish each element upon which it predicated its rate increase, and Tennessee had no basis for complaint inasmuch as it was being relegated (by the Commission's interim order) to the precise position which it would have occupied had it based its rates, in the first instance, upon a proper rate of return (App. A, *infra,* p. 37). On October 5, 1961, the same panel of the court, Chief Judge Tuttle again dissenting, denied the Commission's petition for rehearing *en banc* (App. C, *infra,* p. 44).

REASONS FOR GRANTING THE WRIT

The decision below would prevent the Federal Power Commission from requiring an immediate reduction of a natural gas company's increased rates even though those rates are predicated in part upon an attempted company justification which had been found, after full hearing, to be deficient. It would prevent the Commission from continuing to use a procedure—interim rate orders—designed to carry out the mandate of Section 4 of the Natural Gas Act that the Commission decide increased rate questions "as speedily as possible" so as to relieve ultimate consumers of the burden of paying excessive

rates. We submit, moreover, that the decision below is inconsistent with the decisions of two other courts of appeals as well as with a ruling of this Court.

1. Under the Natural Gas Act, the seller initiates rate changes. See *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332. The rates, however, are subject to Commission review, and the Act expressly imposes upon the seller the burden of proving the justness and reasonableness of its increased rates. Section 4(e), *infra*, pp. 40–41. Here Tennessee filed increased rates for each of its six rate zones and attempted to justify them (and thus meet its burden of proof) on the basis of a cost of service which included a 7 percent return on its claimed net investment. This justification it failed to sustain. For, after a full hearing on the rate of return, the Commission found that 7 percent was excessive and that a rate of 6⅛ percent was just and reasonable. In dollars and cents, this meant that the increased rates made and filed by Tennessee would have yielded revenues, on the basis of the test year, about eleven million dollars in excess of what Tennessee itself could properly justify when it made its filing, even if the remainder of Tennessee's case in support of these rates were accepted. Accordingly, the Commission disallowed the increased rates to the extent that they were predicated on this excessive rate of return and required Tennessee to file reduced rates reflecting a proper

return, but otherwise based on Tennessee's original presentation.[9]

Although the court below unanimously held that the Commission's determination of the rate of return was correct, the majority set aside that portion of the Commission's order which gave it immediate effect. The result is to permit the continued collection of company-made rates, which the company could not support when put to the test, from distributing company-customers and from ultimate consumers, who are, of course, intended to be the prime beneficiaries of regulation under the Natural Gas Act. See *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 147; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610.

The decision seems to rest largely on the erroneous view that consumers are fully protected, albeit they continue to pay excessive rates, by the pipeline's ultimate obligation to refund the excess charges with interest. But, as the Commission has recognized,[10] the protection afforded by refund provisions is by no means complete. Ours is a mobile society; those consumers of natural gas who pay excessive rates in a given area today are scattered as the months go by. For the ordinary consumer, even if he does not move, a daily increase in his cost of living is not offset by

---

[9] Since the hearing had been concluded only with respect to the rate of return, Tennessee was permitted to put these new rates into effect, subject to refund, as of the date the disallowed rates had become effective (April 5, 1960).

[10] See, *e.g.*, Federal Power Commission Annual Report for 1953, p. 191.

the prospect of receiving a lump sum sometime in the future. Cf. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707–708. The Court has encountered this problem in the cases dealing with the disposition of funds impounded as a result of judicial stays of Commission rate reduction orders. See, *e.g.*, *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577; *Central States Co.* v. *Muscatine*, 324 U.S. 138. Moreover, the inflationary impact of present-day high rates is scarcely relieved by the possibility of refunds at an indeterminate date in the future.[11]

The pipelines' obligation to pay interest on refunds cannot be regarded as an effective deterrent to excessive rate filings. Quite the contrary. The vast amounts collected by the pipelines subject to refund, *infra*, p. 19, often provide a relatively cheap source of expansion capital. Although the pipelines make re-

[11] The structure of the Act gives apparent recognition to the imperfect nature of refund protection for the ultimate consumer. Otherwise, there would have been no need to grant the Commission power to suspend for a five-month period. It should be noted, in this connection, that the suspension provision of the Interstate Commerce Act, upon which the Natural Gas Act was modelled (see *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C.A. 4)), was added because reparations were deemed an inadequate remedy for the shipper. See 1 Sharfman, *The Interstate Commerce Commission* (1931), pp. 201–202. It was also recognized that an unduly long suspension period would give inadequate protection to the carrier because of the inability to collect higher rates retroactively if it was later found that the carrier had been justified in filing its increased rates. Hence, provision was made to permit collection of increased rates, subject to refund, after the suspension period, imperfect as that protection might be. *Ibid.*

funds with 7 percent interest, the effective cost to them is much less. A corporation in the 52 percent tax bracket will recoup approximately half the cost of interest charges in tax deductions. Moreover, accretions to capital resulting from a continuing pattern of excessive charges increase a pipeline company's equity, which characteristically earns a substantially higher rate of return than its borrowed capital costs. Thus, the decision below takes from the Commission an effective tool for dealing with the prevalent practice of making consumers involuntary lenders.

2. *a.* The court below disapproved the interim order because the Commission had not heard and decided the cost allocation issue, although, for the purposes of this interim order, the Commission accepted Tennessee's allocation methods. This ruling runs counter to *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583–585; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 236 F. 2d 606 (C.A. 3); and *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690, 715–716 (C.A. 8), certiorari denied, 346 U.S. 922.

In *Federal Power Commission* v. *Natural Gas Pipeline Co., supra*, this Court affirmed an interim reduction of rates pursuant to a Section 5(a) investigation. It held, *inter alia*, that a company which had presented its entire direct testimony in support of its rates could not complain that it had not yet been able to examine Commission witnesses on aspects of the case which, for purposes of the interim order, the

Commission had decided on the basis of the company's presentation. 315 U.S. at 584.

In *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra,* the Commission eliminated a portion of an increased rate after the company had presented its entire case in chief, disallowing about $5,000,000 annually of Panhandle's proposed jurisdictional revenues. The Commission relied on its disallowance of the same elements in the preceding *Panhandle* case and pointed out that no new or supervening occurrences had been shown to warrant reconsideration of the Commission's recent decision. The Third Circuit, rejecting Panhandle's contention that no reduction could be ordered until all phases of the case had been resolved, held that a company which fails to make out a *prima facie* case in support of its cost of service is not entitled to continue collection of the unproved portion of its rates. The court pointedly observed (236 F. 2d at 608):

> * * * Panhandle must have based its claim for a higher rate of return upon justification existing at the time of filing. It is difficult to see how else a change could have been proposed in good faith. True, in recognition of the time involved in these often long drawn out rate proceedings, the commission quite properly permits the basic showing of the justification which existed at the time of filing to be supplemented by evidence of occurrences since filing. But this is far from saying that a party who tries and fails to make a prima facie showing to support severable elements of his claim is entitled to a postponement of adjudication thereon in anticipation of possible new justifi-

> cation which some future event may supply before the overall case can be completed.
>
> Here the record shows that Panhandle was given full opportunity to offer all of its evidence in support of the items which the commission disallowed in the order now on appeal. Thereafter, the commission was under no obligation to postpone its ruling on those matters. * * * [12]

In the *State Corporation Commission* case, *supra*, the Eighth Circuit affirmed the Commission's interim reduction of increased rates filed by Northern Natural Gas Company to reflect the disallowance of $7,601,853 of the company's claimed cost of service. As in the *Panhandle* case, the portion disallowed consisted of elements which the Commission had rejected in Northern's preceding rate case and as to which the Commission found, after presentation of Northern's affirmative case, that no intervening changes had been shown warranting differen treatment.

b. The instant case stands on no different footing merely because there is an unresolved issue as to allocation of the company's total costs. In fact, allocation issues of various kinds were also undecided in the *State Corporation* and *Panhandle* cases when the Commission directed immediate rate reductions.[13] In

---

[12] Compare the statement of the court below that "in filing rates a public utility should not be held, at its peril, to the requirement of foretelling the decision of the Commission on the correctness of the rates. * * *" (App. A, *infra*, p. 33).

[13] See *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690, 712 (C.A. 8) and *Panhandle Eastern Pipe Line Co.*, 25 F.P.C. 787, 38 P.U.R. 3d 332, pending on review, C.A.D.C., No. 16583.

all events, it is invariably true that the "other issues" (there are, of course, many issues in the typical rate case) which remain whenever the interim order procedure is invoked might conceivably result in an offset, *i.e.*, the rate proponent might be able to prove that, although some elements in the cost of service were overstated, others were underestimated.[14] The

---

[14] Although there is a theoretical *possibility* that, as a result of the Commission's zone allocation decision (not yet rendered), Tennessee may not be able to earn the 6⅛ percent return found proper during the period prior to that decision (see App. A, *infra*, pp. 32–33), there is no basis for the court's statement (App. A, *infra*, p. 34) that the effect of this determination "makes it highly unlikely, if not impossible" for Tennessee to earn that return.

In the first place, even the *possibility* can come to pass only if, after the allocation decision, Tennessee's rates in some zones are raised above the level of the substitute increased or interim rates now on file, while Tennessee is required to make full refunds in other zones. At the time the case was argued below, the presiding examiner had concluded in the related Tennessee case (No. G–11980) that Tennessee's allocation method should remain substantially unmodified. Although this, to be sure, was not a final decision, the court of appeals certainly had no reason to presume that a drastic change in zone allocations was forthcoming. Nor could it be presumed that the rest of Tennessee's claimed cost of service would be approved. Tennessee's interim rates, on a test year basis, are still $59,000,000 in excess of any previously allowed Tennessee. Indeed, in the second phase of the rate proceeding before the Commission, which is now awaiting an examiner's decision, the Commission staff is advocating adoption of a total cost of service about $36,000,000 less than that contended for by Tennessee.

In addition, we note that the Commission is not compelled to translate the results of allocation methods directly into rates, even prospectively, if it concludes that the impact will be detrimental to the public interest. See *Interstate Power Co.* v. *Federal Power Commission*, 236 F. 2d 372 (C.A. 8), certiorari denied, 352 U.S. 967.

crucial consideration is that under Section 4(e) the natural gas company has the burden of justifying its claimed increases. It cannot complain, therefore, if the Commission holds merely that it cannot continue to collect revenues which it has not justified on the basis of its own theory and evidentiary presentation.[15]

c. Nor can this case be distinguished on the ground that the examiner in the related Tennessee case (No. G–11980) had already heard evidence on the matter of zone allocation when the interim order was entered in this proceeding. Not all issues as to which evidence has been taken are susceptible of simultaneous decision. The complex zone allocation issue in No. G–11980 produced an evidentiary record of 4,500 pages and several score of exhibits. The interests of over ninety interveners were involved. The Commission was warranted in concluding that it should have the benefit of the examiner's determination of this issue.[16] As events developed, the examiner's decision on this matter, covering some 131 pages of text, was not handed down until February 13, 1961 (more than six months after the interim order in the instant proceeding), and the matter has since been argued and

[15] The majority below (App. A, *infra*, p. 34) erroneously assumes that the Commission, in finding that it would be proper for a company to earn a particular rate of return, guarantees that such a return will be earned. To the contrary, the Commission's conclusion as to the propriety of a particular rate of return means only that such a return was deemed proper on the basis of a test year and that rates designed to produce such a return in the future are permissible.

[16] It is also pertinent that, while none of the parties had objected to waiver of the intermediate decision on rate of return, strong objection was made by a number of interveners to waiver of such decision with respect to the zone allocation issue.

reargued before the Commission.[17] This chronology emphasizes that the Commission had good reason, in the interest of expedition, to put its rate of return determination promptly into effect. At the same time, there was little reason to believe, as we have shown (fn. 14, *supra*, p. 15), that Tennessee would ultimately suffer from the Commission's decision not to await the determination of the issue of allocation of costs.

3. The decision below has substantial importance both because of the broad thrust of the holding and because of its practical bearing upon the Commission's efforts to afford expeditious relief to consumers of natural gas.

To be sure, the majority opinion of the court of appeals emphasizes that this case involves an unresolved issue as to zone allocation.[18] The decision, however, appears to have wide application. For one thing, allocation issues loom in the background of virtually every major pipeline rate case. Moreover, if cost allocation, as the majority has said (*infra*, p. 34), is "an essential element in determining whether the filed rates are excessive," it would seem that other elements which enter into the cost of service would similarly be deemed "essential." And, if this is so, the practical consequence is that the Commission may never order any reduction in rates—although in particular aspects the proponent has failed to make out its case—until it has disposed of all significant issues in a rate proceeding.

[17] The reargument was held in September 1961 and the matter is now awaiting decision.

[18] There are also other unresolved issues in Tennessee's case—issues upon which the examiner has not yet passed.

If public utility rate proceedings were run-of-the-mill cases, the matter would not be a grave one. But almost invariably such proceedings are complex and protracted, involving many parties and numerous difficult issues. Some of these issues, if severed, may be determined fairly promptly. It may be possible, for example, to decide an issue on the basis of a prior decision involving the same company, or on the basis of a relatively brief presentation of expert testimony. Other issues, however, will characteristically require extensive study and investigation by lawyers, engineers and accountants even before any attempt be made to put in the relevant evidence. As a result, the final resolution of all issues presented by a full-blown rate case may take years, rather than months, even though every effort is made by the Commission to expedite the proceeding. Accordingly, the question whether the Commission may effectively decide one or more issues before it disposes of all of them becomes a matter of considerable practical moment.[19] The decision below, in our view, threatens to destroy the utility of the interim rate procedure. Its significance as

[19] In the *Panhandle* case, *supra*, the amount disallowed by the interim order constituted about 40%, on an annual basis, of the total disallowance ultimately ordered by the Commission in those proceedings, while in the *State Corporation Commission* case, *supra*, the interim reduction represented the full disallowance made. See *Northern Natural Gas Co.*, 13 F.P.C. 1518.

a precedent is heightened by the fact that many of the country's major pipelines have access to the Fifth Circuit.

Pipeline rate increases have become more and more frequent in recent years. Enormous amounts are now being collected subject to the possibility of ultimate refund. At the close of the fiscal year 1961, increased rate proceedings involving 41 pipeline companies were pending before the Commission. These companies were collecting, on an annual basis, approximately $375,000,000 in increases not yet approved by the Commission. In the light of past experience, it must be assumed that a substantial portion of these increases will be found unjustified. Thus, during the fiscal year 1961, the Commission, concluding 31 cases involving increased rates by pipelines, disallowed approximately 37 percent of the increases for which those companies had filed. More than half of this disallowance (approximately 56 percent) resulted from a reduction of the amount claimed for return on net investment.[20]

---

[20] In the present case, the total amount of the proposed increased rates which will be disallowed by the Commission is not yet known. It is, therefore, impossible to state the percentage thereof represented by the interim order's disallowance of approximately $11,000,000 (the amount of disallowance resulting from reduction in the rate of return). But the maximum is probably indicated by the Commission staff's contention that an additional $36,000,000 should be disallowed. Even if the Commission disallowed everything contended for by its staff, the $11,000,000 interim reduction would approximate 23% of the total disallowance.

The Commission believes that the interim order procedure, though certainly not a solution to all problems presented by a serious backlog of cases, is an important tool—one which will aid it in the strenuous effort which it is currently making to determine rate questions "as speedily as possible" (Section 4(e)) and to provide reasonably prompt relief from excessive charges.[21] Indeed, within the space of the past several weeks the Commission staff has proposed the use of this procedure in two major pipeline cases.[22] The instant case will determine in large measure whether this course is a fruitful one.

---

[21] The Commission is mindful of the fact, noted on more than one occasion by this Court, that there have been inordinate delays.

[22] *El Paso Natural Gas Co.*, F.P.C. Docket Nos. G-4769, et al., Tr. pp. 4063-4086 (Nov. 16, 1961); *Cities Service Gas Co.*, F.P.C. Docket No. RP 62-1, Tr. pp. 202-261 (Sept. 13, 1961).

In the *El Paso* case, the California Public Utilities Commission, the City of El Paso, and several California distributing companies, in addition to the Commission's staff, have requested use of the interim order procedure.

In the *Cities Service* case, the Commission staff's request for use of the interim order procedure was opposed by the customer companies, but principally because the pipeline had indicated that it would challenge the procedure in court on the basis of the decision below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
MORTON HOLLANDER,
Attorney.

RALPH S. SPRITZER,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
LUKE R. LAMB,
Assistant General Counsel,
PETER H. SCHIFF,
Attorney,
Federal Power Commission.

DECEMBER 1961.

APPENDIX A

In the United States Court of Appeals For the Fifth Circuit

No. 18547

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER,

versus

FEDERAL POWER COMMISSION, RESPONDENT.

No. 18597

THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY, AND UNITED FUEL GAS COMPANY, PETITIONERS,

versus

FEDERAL POWER COMMISSION, RESPONDENT.

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION.

(August 2, 1961)

Before TUTTLE, Chief Judge, CAMERON and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: These two petitions for review of orders of the Federal Power Commission attack, from somewhat different points, interim orders finding a 6⅛% rate of return just and reasonable, and putting said rate of return into effect before resolving other issues touching on the allocation of

costs between different zones of operation of Tennessee Gas Transmission Company. Generally the name "Tennessee" will be used interchangeably with petitioner, and the name "Columbia Companies" will be reserved to discuss the petition of Manufacturers Light and Heat Company, The Ohio Fuel Gas Company and United Fuel Gas Company.

The history of the proceedings leading up to the orders complained of is taken almost completely from the statement in petitioner's brief. In using such statement we have, however, eliminated some expressions of opinion and explanatory statements:

Tennessee owns and operates a natural gas pipeline system extending in a northeasterly direction from its sources of supply in Texas and Louisiana through the States of Texas, Louisiana, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, Massachusetts, New Hampshire, Rhode Island and Connecticut. The rates charged by Tennessee for the transportation of natural gas and sales for resale of natural gas in interstate commerce are subject to the jurisdiction of the Commission under the Natural Gas Act (15 U.S.C. 717–717w).

On October 5, 1959, Tennessee filed with the Commission, pursuant to Section 4(d) of the Natural Gas Act, schedules of rate changes designed to recover the increased cost of providing natural gas service. These schedules set forth the respective rates proposed by Tennessee for each type of service in each rate zone on the Tennessee system. The Tennessee system is divided into six rate zones, with rates differing among the zones to give effect to distance, as well as other factors.

By order issued November 4, 1959, the Commission ordered a hearing to determine the "lawfulness" of the rates which had been filed. Following a five-month period of suspension, the rates became effective April 5, 1960, subject to an undertaking by Tennessee, required by Commission order, to "refund at such times and in such manner as may be required by final order of the Commission, the portion of the increased rates found by the Commission in this proceeding not justified, together with interest thereon at the rate of 7 percent per annum."

Hearings commenced on February 2, 1960, and continued intermittently until recessed on May 25, 1960. During the course of the hearings, Commission Staff Counsel moved that the hearing be divided into two phases. He proposed that the first phase deal solely with the issue of rate of return, and the remaining issues be reserved for a later stage of the proceeding. Staff Counsel further proposed that upon completion of the first phase of the proceeding, the Examiner's decision be omitted; that the Commission issue a decision determining the fair rate of return for Tennessee; and that the Commission issue an interim order requiring Tennessee to reduce its rates and make refunds, in the event the Commission concluded that the fair rate of return is less than claimed by Tennessee.

When Staff Counsel made his motion, there was pending before the Commission, in another proceeding involving Tennessee (Docket No. G–11980), an issue as to the proper method of allocating Tennessee's cost of service among its six rate zones and various services. By order issued April 30, 1959, in Docket No. G–11980, the Commission ruled that determination of the allocation issue should be expedited and, to that end, severed that issue for sepa-

rate and prior hearing and determination in that case. At the time Staff Counsel made his motion, the allocation issue had been thoroughly tried and briefed and was before the examiner for decision. Additionally, the Examiner in the instant proceeding had ruled that the determination of the allocation issue in Docket No. G-11980 would govern the method of allocating Tennessee's cost of service in this case.

Since it contended that determination of the allocation issue was required in order to translate the cost of service into rates for the various zones and services, Tennessee filed a memorandum opposing the Staff's motion for an interim order on the ground, *inter alia*, that such order would be illegal unless the Commission simultaneously determined the allocation issue. On July 19, 1960, Tennessee filed a motion with the Commission requesting it to determine the allocation issue simultaneously with the issue of rate of return. By order issued August 5, 1960, the Commission denied Tennessee's motion.

On August 9, 1960, the Commission issued its order, herein sought to be reviewed, adopting the Staff's interim order procedure. As stated above, by such order the Commission disallowed Tennessee's claim for a 7 percent return, fixed a 6⅛ percent rate of return, required Tennessee to file reduced rates retroactively to April 5, 1960, and required Tennessee to make refunds for the differences in rates collected since April 5, 1960. The Commission's order did not, however, make any determination as to the proper method of cost allocation which should be employed in allocating the reduced cost of service among the six rate zones on the Tennessee system. Nor did the Commission make a determination as to which of the various rates filed

by Tennessee were unlawful, which rates should properly be reduced, or to whom refunds were lawfully due. Instead, the Commission left these questions open for later determination.

On August 29, 1960, Tennessee filed its application for rehearing which the Commission denied by its order issued September 27, 1960. On October 3, 1960, Tennessee filed its petition to review with this Court and simultaneously filed a motion for stay of the Commission's order. On October 28, 1960, this Court, with one Judge dissenting, denied the motion for stay.

Although Tennessee summarizes its extended specifications of error by placing them in five numbered paragraphs,[1] we discuss them under two headings:

(1) The rate of 6⅛ percent was based on findings "unsupported by substantial evidence and is unreasonably low."

(2) The Commission erred in putting a rate less than 7 percent into effect by an interim order prior to determining whether the cost allocations between the six zones were lawful.

Considering first the 6⅛ percent rate, we find that the Commission had before it a full record disclosing

---

[1] This summary is as follows:

"1. The Commission erred in allowing Tennessee an over-all rate of return of only 6⅛ percent. Such rate of return is confiscatory, deprives Tennessee of property without due process of law in contravention of the Fifth Amendment of the Constitution of the United States, and constitutes discriminatory, arbitrary and capricious action against Tennessee.

2. The 6⅛ percent rate of return is based on findings unsupported by substantial evidence and is unreasonably low in that:

a. It fails to yield a return on common book equity commensurate with returns being earned by enterprises having corresponding risks.

sufficient economic factors to permit it to determine what was a just and reasonable return. Both Tennessee and the Commission recognize that the standard and principles to be observed in testing the correctness of the Commission's findings are to be found in the two cases: *Bluefield Waterworks & Improvement Co.* v. *Public Service Commission of W. Virginia*, 262 U.S. 679, 692, and *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591.

The petitioner greatly stresses the following language from the Hope case:

". . . the return to the equity owner should be commensurate with returns on investments in

---

b. It is unjustifiably less than the rate of return allowed by the Commission in its most recent decisions to pipeline companies having a more secure capital structure than Tennessee.

c. It fails to provide the margin of safety over the cost of debt necessary to prevent the quality of Tennessee's senior securities from deteriorating and being downgraded.

3. The Commission arbitrarily required Tennessee to reduce the rate of return on its natural gas production properties even though the Commission set for further hearing the issue of the rate of return to be allowed on such properties.

4. The Commission erred in the computation of Tennessee's capital structure in failing to include as common equity capital the convertible preferred stock which was in the process of being converted into common stock, and in failing to include in the capital structure mortgage bonds which had been issued by a Tennessee subsidiary.

5. The Commission illegally and arbitrarily set aside Tennessee's rates without deciding the cost allocation issue, which decision was necessary in order for the Commission to determine which, and to what extent, the individual zone rates filed by Tennessee were unlawful."

> other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. . . ."

Although the Commission does not counter by emphasizing any particular language of the opinion, we cannot overlook the following:

> " . . . It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. *Railroad Commission* v. *Cumberland Tel. & Tel. Co.*, 212 U.S. 414; *Lindheimer* v. *Illinois Bell Tel. Co., supra,* pp. 164, 169; *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 401." 320 U.S. 591, 602.

In stressing the language, "The return to equity owners should be commensurate with returns on investments in other enterprises having corresponding risks," petitioner argues extensively from the tables showing *average earnings* of the ten major pipelines over an eight-year period ending with 1958 and for the 41 pipeline companies comprising the entire industry over a ten-year period ending in 1959. It also

strongly emphasizes the fact that the 6⅛ percent return will yield the lowest return on common stock equity for any of its years of operation.[2]

The weakness of this approach is twofold: (1) There is no basis for Tennessee's implied assumption that it or any of the pipeline companies are entitled to the same return on book equity which they have historically enjoyed. "A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally." *Bluefield Waterworks & Improvement Co.* v. *Public Service Commission, supra,* p. 893. (2) The Commission found that petitioner was not an "average" pipeline company but rather that it is one of the largest and soundest. It is thus a non sequiter for petitioner to argue that because the eight or nine year *average* return on common equity of a group of companies has been higher than 10.12 percent then that rate is not just and reasonable for Tennessee for 1960.

The Commission specifically stated that it did "give consideration to the evidence of the return on book equity of Tennessee as compared to the other major pipeline companies as a factor in fixing a return which is commensurate with returns on investments of other enterprises having corresponding risks." With the evidence touching on the returns on book equity of other major pipeline companies present in the record, we cannot find, as invited to do by petitioner, that this statement of the Commission is without foundation.

---

[2] It is not disputed that the 7 percent overall return sought by Tennessee would have provided a 12.70 percent return on the book value of Tennessee's common equity capital or that the 6⅛ percent overall return would provide a 10.12 percent return on common equity.

Petitioner strongly attacks the weight attributed by the Commission to the "earnings-price" ratios of Tennessee as bearing on its competition for the investor dollar. We think it clear that the Commission used such comparison to test the degree to which the investing public considered the return to be "commensurate" with other pipeline companies. Touching on this matter the Commission said, "Such data indicate that Tennessee enjoys a favorable and improving position in the money market in relation to the rest of the industry."

We have carefully analyzed the criticisms levelled by the petitioner on both the method used by it and its conclusions explaining its reason for adopting the 6⅛ percent rate of return, and we find them to be without substance on the record before us. Moreover, we find no merit in the contention that the Commission erred, in the computation of Tennessee's capital structure, in failing to include as common equity capital the convertible preferred stock which was in the process of being converted into common stock and in failing to include in the capital structure mortgage bonds which had been issued by a Tennessee subsidiary. We consider the treatment given to these two items by the Commission as well within its discretionary powers.

We next come to the challenge of the Commission's applying the 6⅛ percent rate of return to Tennessee's natural gas production properties before a determination was made as to whether a different rate of return was justified for these properties. The Commission answers this complaint in two ways. It says, first, that Tennessee did not distinguish, in its application for a 7 percent overall rate, between the rate of re-

turn it was entitled to receive on its production properties from the overall rate. We think this is not an adequate answer, because a larger return for production properties may well have been recovered under a 7 percent overall rate, whereas this might not be the case under a 6⅛ percent overall rate if production properties were later found to be entitled to a higher rate of return. However, as to the second point urged by the Commission, we think it fully answers petitioner's contention. In allowing 6⅛ percent rate of return, the Commission postponed for future consideration the treatment to be afforded substantial amounts received by petitioner through its treatment of federal income tax provisions for statutory depletion and intangible well-drilling costs. The Commission concluded that if Tennessee shows that it is entitled to a higher return on that part of its capital that is represented by production properties, this can be provided for when the Commission makes a final disposition of the treatment of the two tax benefits reserved for later consideration.

We next come to the complaint that the Commission could not legally enter the interim order denying the 7 percent rate of return and inviting the filing of new schedules based upon a 6⅛ percent rate so long as there remained unresolved the question whether the allocations of cost among the six zones of operation would ultimately be approved by the Commission.

A majority of the Court, with the writer of this opinion dissenting, concludes that the Commission could not legally effectuate its order requiring the 6⅛ percent rate of return to be given effect until it had made its determination as to the proper allocation of

cost of service among the several zones. The following part of the opinion, written by Judge Wisdom, and concurred in by Judge Cameron, becomes the Court's opinion touching on this phase of the appeal:

WISDOM, Circuit Judge: On April 30, 1959, in another proceeding involving Tennessee, in Docket No. G–11980, the Commission issued an order stating:

> "It is our view that separate and prior hearing on the issues relating to the principles and methods to be applied toward allocation of costs among the zones on Tennessee's system and among the classes of service within the zones will aid in the disposition of this proceeding and may be of similar aid in disposition of proceedings in Docket No. G–17166."

The Examiner in this proceeding rules that the cost allocation as determined in Docket No. G–11980 would govern the allocation of service in this case. The cost allocation issue is ready for decision.

What the Commission in 1959 considered a reasonable and orderly sequence of proceedings seems equally reasonable and orderly now.[3]

The Commission's refusal to decide the cost allocation issue means that there is no basis for determining which of the filed rates in specific zones are unlawful, the extent to which individual rates should be reduced, or to whom refunds are due. Meanwhile, the effect of the interim order is to continue the alleged discriminatory differential in favor of Zones 1, 5, and 6, although the Columbia companies, operating in Zones 2, 3, and 4, for several years have been endeavoring to have the Commission determine a proper

---

[3] In *Tennessee Gas Transmission Co.*, FPC Docket No. G-5259, the Commission issued an order holding that it would be "premature," "unfair" and "improper" to issue an interim order before determining pending allocation issues.

cost allocation among the zones. Tennessee will be injured, because it will not be able to recover adequate costs of services from the undercharged distributors in Zones 1, 5, and 6. For that matter, Tennessee would be injured if it were entitled to an overall return of 7 percent on its investment. It will be injured in any case because of the retroactive effect that will follow from the Commission's belated determination of cost allocation. This effect works in favor of Tennessee's overcharged customers, who are entitled to refunds, but works against Tennessee since it may not recoup from undercharged customers. Tennessee, therefore, will be unable to earn the return the Commission considers just and reasonable, no matter what that rate is.

It is true, of course, that the allocation of costs in all six schedules was made by Tennessee; that if these allocations are correct and are approved Tennessee will not be damaged; that the burden rests on the applicant to justify each rate increase. But conditions change, costs are not static, and rates are at best an educated guess. It seems that in filing rates a public utility should not be held, at its peril, to the requirement of foretelling the decision of the Commission on the correctness of the rates. The statute appears to have been designed on the assumption filed schedules will have to be adjusted. Lawful rates may be determined only after a full hearing; until the Commission fixes rates the utility is protected by being allowed to collect at the filed rate but under bond and subject to refund, and the consumer is protected by the refund of excess charges with 7 percent interest.

We question whether the hearing in which the cost allocation issues was excluded was the "full hearing" contemplated in Section 4 (e) of the Act. We ques-

tion whether the order, issued after a hearing in which the issue of cost allocation was barred, is a lawful order. It seems, too, that when the retroactive effect of the eventual determination of cost allocation makes it highly unlikely, if not impossible, for a utility to earn a "just and reasonable return," such an interim order lacks the weight and legal effect courts properly give to most orders of the Commission. Finally, regardless of the Commission's authority to issue the order, we hold that cost allocation among zones is such an essential element in determining whether the filed rates are excessive that it is unreasonable and an abuse of discretion to issue an interim rate order before deciding a pending allocation issue ripe for decision.

PER CURIAM:

The Court concludes that the manner in which the foregoing opinions can be given effect is to approve the order of the Commission as to all matters dealt with by it in the challenged order except its decision that the order was to become effective prior to a final determination of the allocation issue, and except the order requiring immediate refunds of the excessive rates collected under the suspended schedules. The order of the Commission is in these respects set aside. The case is remanded to the Commission for further proceedings not inconsistent with this opinion.

CAMERON, Circuit Judge, Concurs in the Result.

TUTTLE, Chief Judge, DISSENTING IN PART:

Although all members of the Court are in accord on the matters discussed in the main body of the opinion, I respectfully dissent from that part of

the opinion that holds that the reduced rate of return cannot be legally effectuated by a Commission order until the Commission makes the determination of allocation of cost of service.

The significance of this issue is made apparent by the petition of the Columbia Companies. This petition asserts that these companies have consistently opposed the schedules filed by Tennessee to be effective in zones 2, 3 and 4, in which they operated because, so they alleged, Tennessee had allocated its cost of service unfairly against their interests and in favor of zones 1, 5 and 6. It is asserted that by reducing the rate to be charged by cutting from 7 percent to 6⅛ percent the rate of return, this would increase the amount by which zones 1, 5 and 6 are underpaying their proper rates. It is clear that if the Commission should later determine that cost allocations improperly favored zones 1, 5 and 6, the customers in those zones would be benefitted to the extent that they had obtained the gas at the rate now approved by the Commissions' interim order. This follows from the structure of the statute which makes rate increases prospective only. In other words, there is no way in which Tennessee could hereafter, if we approve this 6⅛ percent order, collect additional sums to make up for the advantage zones 1, 5 and 6 will have enjoyed because they were favored temporarily with a cost of service allocation improperly weighted in their favor.

Columbia's next contention, however, does not follow from this fact. Columbia claims to be prejudiced because it says zones 1, 5 and 6 may subsequently be found to have received gas too cheaply at Columbia's expense. It is true that it is possible that the Commission may find that zones 1, 5 and 6 have received gas too cheaply. The weak-

ness of Columbia's position, however, is that Columbia is not, and cannot be, hurt by any such subsequent determination. This follows because the rates which Columbia is now paying are still being paid subject to a final determination as to their lawfulness *as to all matters except* the rate of returns on the common equity. Thus, it will be entitled to a refund of all amounts it may be found to have paid in excess of the correct rate because of an improper allocation of costs of service. Columbia is now immediately benefitted to the extent that it is paying, subject to refund, on schedules including a 6⅛ percent rather than a 7 percent rate of return. It is not an aggrieved party merely because the Commission did not proceed to a final determination of other possible savings to it at the same time.

The Columbia companies strongly argue that they are entitled under the statute, as an interested party, to a determination by the Commission of their complaint of undue preferences granted to the other zones in violation of Section 4(b) of the Natural Gas Act. They are undoubtedly entitled to such a determination, but not necessarily before the Commission can eliminate what it finds to be an unlawful increment in the price structure. See *State Corporation Com. of Kansas* v. *F.P.C.*, 8 Cir., 206 F. 2d 690, cert. den. 346 U.S. 922. Columbia could be hurt in these circumstances only if Tennessee were to be permitted to withhold refunds to which Columbia might become entitled on the ground that it could not recoup from zones 1, 5 and 6, and therefore, it could not be required to refund excessive charges from zones 2, 3 and 4. As I will next show, this is *not* the law.

Tennessee claims that there is nothing in the Natural Gas Act that warrants the entry of an

order that has the effect of reducing the charges it can make until the Commission decides whether it may not be charging too little from three zones even though it may be charging too much in three others.

The Commission answers this in two ways: (1) the allocation of costs in all six schedules was made by Tennessee. If these allocations are correct and are approved Tennessee will not be damaged. If they are incorrect they will be corrected and Tennessee will be required to make additional refunds to customers in those zones that were unfairly burdened by the improper allocations, but it will be unable to collect for any increased rates as such that a correct allocation would have warranted from the customers in the zones where there was an unfairly low increment of cost of service. This, the Commission says, is only the natural result of the regulatory scheme envisaged by the Natural Gas Act. The burden rests on the applicant to justify each rate increase. This includes the burden to establish the correctness of the allocation of costs of service as to each schedule filed. Tennessee stands in no different position than if the Commission, after the section 4 hearing, decided that Tennessee was entitled to an overall return of 7 percent on its investment, just as asked for by Tennessee, but decided that the cost allocations between the several zones were discriminatory, as here claimed by Columbia. The Commission would not have the authority to *increase* the schedules filed by Tennessee in zones 1, 5 and 6, but it would be under the obligation to reduce those for 2, 3 and 4 and make refunds for excess amounts paid by Columbia. See *Interstate Power Co.* v. *Federal Power Com.*, 8 Cir., 236 F. 2d 372. In such a situation Tennessee would not realize the full permitted rate of return because it would have failed to substantiate the correctness of the cost allocation. Of

course, the Commission could, and should under such circumstances, authorize the filing of new schedules to have prospective effect to remedy the allocation imbalance, but it would have no power to authorize Tennessee to collect more from zones 1, 5 and 6 than its filed schedules called for. (2) The Commission has a second answer to Tennessee's criticism in this regard. It seems to say that Tennessee still has several unresolved rate increases pending, all of which affect these same zones, and, if Tennessee is found to have undercharged zones 1, 5 and 6, it may have ample funds collected under bond subject to refund to customers in these zones from which it can recoup for a failure to charge the permissible rate for the period of this present rate proceeding. I think we need not speculate on this matter because I think the first contention elaborated above is sound.

I would affirm the Commission's order in full.

APPENDIX B.

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides, in pertinent part, as follows:

> SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
>
> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate

to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the

sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract af-

fecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirement for different classes of persons

or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

* * * * *

SEC. 19. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

APPENDIX C

United States Court of Appeals

For the Fifth Circuit

OCTOBER TERM, 1960

No. 18,547

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER,

versus

FEDERAL POWER COMMISSION, RESPONDENT.

No. 18,597

THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY, AND UNITED FUEL GAS COMPANY, PETITIONERS,

versus

FEDERAL POWER COMMISSION, RESPONDENT.

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION.

Before TUTTLE, Chief Judge, CAMERON and WISDOM, Circuit Judges.

JUDGMENT

These causes came on to be heard on the petitions of Tennessee Gas Transmission Company and The Manufacturers Light and Heat Co., The Ohio Fuel Gas Company, and United Fuel Gas Company, for review of orders of the Federal Power Commission issued on August 9, 1960 and September 27, 1960 in Docket No. G-19983, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in these causes be, and the same are hereby, approved in part and set aside in part in accordance with the opinion of this Court; and that these causes be, and they are hereby, remanded to the Commission for further proceedings not inconsistent with the opinion of this Court.

"CAMERON, Circuit Judge, concurs in the result."

"TUTTLE, Chief Judge, dissents in part."

Issued: August 2, 1961.

FILED

5th day of October 1961

CLAIR R. JAMES

Clerk of the United States Court of Appeals

In the United States Court of Appeals

For the Fifth Circuit

No. 18,547

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

No. 18,597

THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY, AND UNITED FUEL GAS COMPANY, PETITIONERS,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

Petitions for Review of Orders of the Federal Power Commission

(October 5, 1961)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, CAMERON and WISDOM, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

TUTTLE, Ch. J., Dissenting.

U.S. GOVERNMENT PRINTING OFFICE 1961